

Page 209

1 subscribers that are attracted or retained by
2 particular programming.
3 They're certainly aware, for example,
4 that -- that perhaps, you know, sports attracts a
5 predominantly male audience and things of that
6 nature. So if they find it important --
7 particularly important to attract and retain a
8 male audience, that might elevate the value that
9 they attach to the sports programming on these
10 signals.

11 JUDGE WISNIEWSKI: But it's a loose
12 connection as opposed to a specific?

13 THE WITNESS: That's true. We haven't
14 attempted to -- to ask a specific question that --
15 that goes directly to your point.

16 JUDGE WISNIEWSKI: My question was,
17 would there be any value to, in fact, trying to get
18 at that issue?

19 THE WITNESS: Well, I think that --
20 certainly, there are many questions that we could
21 ask. And I think one thing that we have to be
22 very careful of as we design this survey is, you

Page 210

1 know, we -- we want to get an acceptable response
2 rate.

3 These are busy executives, so we need
4 to consider that in designing our survey such that
5 we're not attempting to keep them on the phone for
6 an excessive length of time where we'll either hurt
7 participation or hurt their interest in focusing on
8 the questions that we feel are most important.

9 JUDGE WISNIEWSKI: Now that we've
10 established here in the last few minutes Question 3
11 has declined in its value, perhaps we might
12 consider substituting a question of this sort?

13 THE WITNESS: And that is a -- you
14 know, a relatively -- in the context of the time
15 we've been doing this, a relatively recent
16 development, and I take your point.

17 JUDGE WISNIEWSKI: Thank you, sir.
18 That's all.

19 CHIEF JUDGE SLEDGE: Any follow-up as a
20 result of those questions?

21 MR. COOPER: No, Your Honor.

22 CHIEF JUDGE SLEDGE: All right. Thank

1 you, sir.

2 THE WITNESS: Thank you.

3 CHIEF JUDGE SLEDGE: We'll recess for
4 10 minutes.

5 (Whereupon, a brief recess was taken
6 from 2:44 p.m. to 2:59 p.m.)

7 CHIEF JUDGE SLEDGE: We'll come to
8 order.

9 Mr. Cooper.

10 MR. COOPER: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. COOPER:

13 Q. Mr. Crandall, would you introduce
14 yourself to the Judges?

15 CHIEF JUDGE SLEDGE: Are you calling
16 Mr. Crandall as a witness?

17 MR. COOPER: I'm sorry. We are calling
18 Robert Crandall as a witness, Your Honor.

19 CHIEF JUDGE SLEDGE: Mr. Crandall,
20 please stand.

21

22

Page 212

1 WHEREUPON,

2 ROBERT W. CRANDALL

3 was called as a witness and, having been first
4 duly sworn, was examined and testified
5 as follows:

6 CHIEF JUDGE SLEDGE: Thank you.
7 Please be seated.

8 BY MR. COOPER:

9 Q. Apologies, Mr. Crandall --

10 MR. COOPER: -- and Your Honors.

11 BY MR. COOPER:

12 Q. Would you now introduce yourself?

13 A. My name is Robert W. Crandall. I'm a
14 senior fellow at the Brookings Institution, an
15 economist who has worked on a variety of
16 communications -- telecommunications matters over
17 the years.

18 Q. And, Mr. Crandall, I'm over here with a
19 fan next to me. If you could keep your voice up,
20 I'd appreciate it. I'm sure Judge Roberts is in a
21 similar predicament.

22 A. Sure.

<p style="text-align: right;">Page 213</p> <p>1 Q. Would you just briefly summarize your 2 educational background?</p> <p>3 A. I have an undergraduate degree from the 4 University of Cincinnati and a -- and a Master's 5 and Ph.D. in economics from 6 Northwestern University.</p> <p>7 Q. And you mentioned that you work at 8 Brookings.</p> <p>9 Are you also employed anywhere else?</p> <p>10 A. Well, I do some consulting, and I'm 11 associated with a consulting firm now called 12 Empiris.</p> <p>13 Q. What is the nature of both your work at 14 Brookings and your work with Empiris?</p> <p>15 A. At Brookings, it's a nonprofit research 16 institution, and we do research on a variety of 17 public policy issues. And I write books and 18 journal articles on areas in my expertise.</p> <p>19 At Empiris, I do consulting for mostly 20 private clients.</p> <p>21 Q. And have you published anything 22 relating to television or broadcasting?</p>	<p style="text-align: right;">Page 215</p> <p>1 Q. And maybe I should have made this 2 clear, but what is the field of -- of research or 3 study that -- that you consult and write on?</p> <p>4 A. Well, I'm an industrial organization 5 economist who has specialized a great deal on 6 regulation in a few specific industries: 7 automobile, steel, with the communications sector 8 heavily for the last few years, and particularly 9 broadcasting and telecommunications and cable 10 television.</p> <p>11 Q. And have you testified before in the 12 cable distribution proceedings?</p> <p>13 A. Yes, I have, I believe on at least 14 three different proceedings.</p> <p>15 Q. 1989, '90 to '92 and '98 to '99?</p> <p>16 A. I believe that's correct.</p> <p>17 Q. All right.</p> <p>18 MR. COOPER: Your Honor, at this time, 19 I would offer Dr. Crandall as an expert in the 20 economics of cable in the broadcast television 21 industries.</p> <p>22 CHIEF JUDGE SLEDGE: Any objection to</p>
<p style="text-align: right;">Page 214</p> <p>1 A. Yes.</p> <p>2 Over the years, I've probably published 3 10, 11 journal articles on cable television and 4 television broadcasting, motion picture industry 5 and one book with former 6 Commissioner Harold Furchtgott-Roth on cable 7 television and the effects of the '92 Act.</p> <p>8 Q. Where was he a commissioner?</p> <p>9 A. He was -- oh, I'm sorry. He was a 10 commissioner at the Federal Communications 11 Commission after he wrote the book, actually.</p> <p>12 Q. Thank you.</p> <p>13 And are those -- I don't want to go 14 through them now, but are those articles included 15 in your CV attached to your written direct 16 testimony?</p> <p>17 A. Yes, they are.</p> <p>18 Q. All right. And have you consulted with 19 commercial clients with respect to television or 20 broadcasting issues?</p> <p>21 A. Yes, for both cable companies and 22 television broadcasting networks over the years.</p>	<p style="text-align: right;">Page 216</p> <p>1 the proffer?</p> <p>2 (Pause.)</p> <p>3 CHIEF JUDGE SLEDGE: Without objection, 4 it's accepted.</p> <p>5 MR. COOPER: Thank you, Your Honor.</p> <p>6 BY MR. COOPER:</p> <p>7 Q. Now, Dr. Crandall, have you prepared 8 written direct testimony in connection with this 9 proceeding?</p> <p>10 A. Yes, I have.</p> <p>11 MR. COOPER: Your Honor, may I approach 12 the witness and the Bench to hand out copies?</p> <p>13 CHIEF JUDGE SLEDGE: Yes.</p> <p>14 BY MR. COOPER:</p> <p>15 Q. Dr. Crandall, I've handed you what's 16 been marked for identification as 17 Settling Parties Exhibit 3. 18 (Settling Parties Exhibit No. 3 was 19 marked for identification.)</p> <p>20 THE WITNESS: Yes.</p> <p>21 BY MR. COOPER:</p> <p>22 Q. Do you have that in front of you?</p>

<p style="text-align: right;">Page 217</p> <p>1 A. I do.</p> <p>2 Q. All right. Can you tell us what</p> <p>3 Settling Parties Exhibit 3 is?</p> <p>4 A. It's my written testimony in this</p> <p>5 proceeding.</p> <p>6 Q. Are there any corrections that you</p> <p>7 would like to make to your written testimony?</p> <p>8 A. No.</p> <p>9 Q. Do you declare under penalty of perjury</p> <p>10 that your written direct testimony is true and</p> <p>11 correct and of your personal knowledge?</p> <p>12 A. Yes, I do.</p> <p>13 MR. COOPER: Your Honor, I'd like to</p> <p>14 offer Settling Parties Exhibit 3 into evidence.</p> <p>15 CHIEF JUDGE SLEDGE: Any objection to</p> <p>16 Exhibit 3?</p> <p>17 MR. LANE: Your Honor, Dennis Lane on</p> <p>18 behalf of Program Suppliers. We would object to</p> <p>19 Footnote -- Footnote Number 9 on Page 5 and the</p> <p>20 accompanying text, and Footnote Number 14 on Page 8</p> <p>21 and the accompanying text.</p> <p>22 We move to strike that as referring --</p>	<p style="text-align: right;">Page 219</p> <p>1 JUDGE ROBERTS: I understood this to be</p> <p>2 Footnote 9, not the sentence generated in</p> <p>3 Footnote 9.</p> <p>4 CHIEF JUDGE SLEDGE: It's the text and</p> <p>5 the footnote.</p> <p>6 JUDGE ROBERTS: Text and the footnote.</p> <p>7 MR. COOPER: Footnote 9 and the text.</p> <p>8 I'm making an assumption about what the text is</p> <p>9 referring to.</p> <p>10 JUDGE ROBERTS: Okay.</p> <p>11 MR. COOPER: So that's -- Your Honor,</p> <p>12 our view is that that's within the scope of -- the</p> <p>13 text is within the scope. Footnote 9 is simply a</p> <p>14 reference in support of the text.</p> <p>15 And my understanding is counsel's</p> <p>16 objection is based on whether an exhibit referenced</p> <p>17 in a footnote comes into evidence. And I don't --</p> <p>18 it's typical in expert reports that not all</p> <p>19 exhibits would come into evidence if they're the</p> <p>20 sort of thing that's relied upon in an expert in</p> <p>21 the ordinary course.</p> <p>22 So without regard to whether Exhibit 5</p>
<p style="text-align: right;">Page 218</p> <p>1 it refers to exhibits that have not been offered</p> <p>2 into evidence, and we do not believe they will be</p> <p>3 offered into evidence.</p> <p>4 MR. COOPER: Your Honor, if I may --</p> <p>5 CHIEF JUDGE SLEDGE: I will call on</p> <p>6 you.</p> <p>7 MR. COOPER: I'm sorry, Your Honor?</p> <p>8 CHIEF JUDGE SLEDGE: I will call you</p> <p>9 on.</p> <p>10 MR. COOPER: Okay.</p> <p>11 (Pause.)</p> <p>12 CHIEF JUDGE SLEDGE: Any response to</p> <p>13 the text in Footnote 9?</p> <p>14 MR. COOPER: Your Honor, I'm not</p> <p>15 sure -- I'm assuming counsel is referring to the</p> <p>16 sentence that ends with Footnote 9 as -- with</p> <p>17 respect to the text, and that sentence offers a --</p> <p>18 offers an opinion regarding the economic</p> <p>19 sensibility of the statute.</p> <p>20 That's well within the scope of the</p> <p>21 expertise on which Mr. Crandall has been</p> <p>22 qualified.</p>	<p style="text-align: right;">Page 220</p> <p>1 comes into evidence, I believe that Mr. Crandall</p> <p>2 should be permitted to -- to include that citation.</p> <p>3 CHIEF JUDGE SLEDGE: Anything further,</p> <p>4 Mr. Lane?</p> <p>5 MR. LANE: Yes, Your Honor.</p> <p>6 If there's no exhibit in the record,</p> <p>7 there's no reason to have the citation. My</p> <p>8 objection is that those exhibits listed in the</p> <p>9 footnote will not be in the record, and, therefore,</p> <p>10 they are of no use to you, and they shouldn't be</p> <p>11 included in the testimony.</p> <p>12 CHIEF JUDGE SLEDGE: The objection to</p> <p>13 the text in Footnote 9 is overruled.</p> <p>14 Any response to the objection to</p> <p>15 Footnote 14?</p> <p>16 MR. COOPER: Your Honor, my</p> <p>17 understanding is the objection was both for text</p> <p>18 and footnote.</p> <p>19 Again, with respect to the text, the</p> <p>20 sentence that I presume counsel is referring to is,</p> <p>21 In my opinion, it is a robust and reliable</p> <p>22 instrument with a significant track record.</p>

<p style="text-align: right;">Page 221</p> <p>1 Your Honor, just as before, that's</p> <p>2 within the scope of the expertise on which the</p> <p>3 witness has been qualified without objection, and,</p> <p>4 I believe, therefore, should be admitted.</p> <p>5 Footnote 14 has two parts to it,</p> <p>6 Your Honor. The first part are just citations to</p> <p>7 the -- to the record of prior proceedings,</p> <p>8 decisions in prior proceedings. I don't -- there</p> <p>9 would be arguments that those shouldn't come into</p> <p>10 evidence because they're matters of public record,</p> <p>11 and -- and the witness is citing to the track</p> <p>12 record that he's referring to in the text above.</p> <p>13 Certainly, citations to authority are</p> <p>14 standard in expert -- in expert reports.</p> <p>15 The second part is simply a recitation</p> <p>16 of economists who have supported --</p> <p>17 CHIEF JUDGE SLEDGE: I'm sorry.</p> <p>18 Citations to authority are standard in expert</p> <p>19 reports? That's different than saying that experts</p> <p>20 state what they have considered in reaching their</p> <p>21 opinions.</p> <p>22 What authority are you referring to?</p>	<p style="text-align: right;">Page 223</p> <p>1 MR. LANE: Yes, Your Honor. I'll</p> <p>2 withdraw the objection as to the text, but on the</p> <p>3 footnote, the witness is an economist.</p> <p>4 He's just been qualified as an</p> <p>5 economist. The first sentence refers to, as far as</p> <p>6 I can tell, a discussion of what was said in a</p> <p>7 legal document. So I don't know how that is</p> <p>8 important.</p> <p>9 The second part refers specifically to</p> <p>10 specific exhibits. He keeps saying it refers to</p> <p>11 testimony in prior proceeding. And my objection is</p> <p>12 that these have been marked as exhibits, and they</p> <p>13 are not going to be introduced in this proceeding.</p> <p>14 And if they want to bring them in some</p> <p>15 other way, they can try that, but this is about an</p> <p>16 exhibit that will not be in the record --</p> <p>17 introduced into the record.</p> <p>18 Counsel has not indicated that they</p> <p>19 intend to introduce any of these as an exhibit in</p> <p>20 this proceeding.</p> <p>21 CHIEF JUDGE SLEDGE: Mr. Lane, I infer</p> <p>22 from your objection that you have an understanding</p>
<p style="text-align: right;">Page 222</p> <p>1 MR. COOPER: I -- I'm not sure that --</p> <p>2 we may be talking about the same thing.</p> <p>3 It's typical and permissible for</p> <p>4 experts to cite to materials they have considered,</p> <p>5 including authorities in the sense of academic</p> <p>6 literature or other materials upon which they've</p> <p>7 relied.</p> <p>8 So usually, the materials upon which an</p> <p>9 expert relies relates to discovery materials and</p> <p>10 they cite additional authorities, but they could be</p> <p>11 understood to be the same.</p> <p>12 So here, in the first part of</p> <p>13 Footnote 14, Dr. Crandall is just citing to the</p> <p>14 public record. And in the second part, he's citing</p> <p>15 to a list of economists who have testified in prior</p> <p>16 proceedings to the Bortz -- in support of the Bortz</p> <p>17 surveys, which itself, too, is likely part of the</p> <p>18 public record, but, again, supports his -- his</p> <p>19 statement, which was within the scope of his</p> <p>20 expertise.</p> <p>21 CHIEF JUDGE SLEDGE: All right.</p> <p>22 Mr. Lane, any response?</p>	<p style="text-align: right;">Page 224</p> <p>1 that the matters considered by an expert in</p> <p>2 reaching an opinion must be admitted into</p> <p>3 evidence?</p> <p>4 MR. LANE: No, Your Honor. I have an</p> <p>5 understanding that if something is marked as an</p> <p>6 exhibit, as you see in the parenthetical, for</p> <p>7 example, with regard to David Scheffman, we see</p> <p>8 JSC -- JSC 05 Exhibit 8 at 2123.</p> <p>9 What I'm saying to you is since that</p> <p>10 exhibit, JSC 05 -- 04-05 Exhibit 8, will not be</p> <p>11 introduced, there's no support for it in the</p> <p>12 record -- for using that in the record.</p> <p>13 If they wanted to cite to the testimony</p> <p>14 from a prior proceeding, they could.</p> <p>15 CHIEF JUDGE SLEDGE: This would be the</p> <p>16 same as -- as the last. Your objection that the</p> <p>17 underlying documents for the testimony is not</p> <p>18 admitted into evidence is overruled.</p> <p>19 The exhibit is admitted.</p> <p>20 (Settling Parties Exhibit No. 3 was</p> <p>21 admitted into evidence.)</p> <p>22 MR. COOPER: Thank you, Your Honor.</p>

<p style="text-align: right;">Page 225</p> <p>1 BY MR. COOPER:</p> <p>2 Q. Dr. Crandall, I really just want to</p> <p>3 focus on two aspects of your testimony today. The</p> <p>4 first is, with respect to as an economist, the</p> <p>5 principle that you would apply to allocate shares</p> <p>6 of a compulsory license fund, the problem that we</p> <p>7 have today, how would you approach that as an</p> <p>8 economist? What standard would you use?</p> <p>9 A. What I've said in my testimony and I've</p> <p>10 said in previous testimony is that it ought to be</p> <p>11 allocated in terms of relative marketplace value,</p> <p>12 the various program categories on the imported</p> <p>13 distant signals.</p> <p>14 Q. And how do you come to that</p> <p>15 conclusion?</p> <p>16 A. Because it's my understanding that the</p> <p>17 compulsory copyright was put in place in order to</p> <p>18 overcome the perceived substantial transactions</p> <p>19 costs involved in -- in negotiations between cable</p> <p>20 system owners and copyright owners, not to replace</p> <p>21 the market necessarily and not to obviate the</p> <p>22 outcome of the market, but rather, to reduce</p>	<p style="text-align: right;">Page 227</p> <p>1 Page 7.</p> <p>2 Do you have that?</p> <p>3 A. I do.</p> <p>4 Q. Now, is the Bortz survey also something</p> <p>5 that you have testified about before?</p> <p>6 A. Yes.</p> <p>7 The surveys have been submitted in a</p> <p>8 sequence of these proceedings over the years, and</p> <p>9 I've testified on them before.</p> <p>10 Q. And if we can look now at Paragraph 16</p> <p>11 and you look at the first sentence there, do you</p> <p>12 see the language, The constant sum survey is the</p> <p>13 best tool to answer the question presented in this</p> <p>14 proceeding?</p> <p>15 A. Yes.</p> <p>16 Q. Can you just explain what you meant by</p> <p>17 that?</p> <p>18 A. Well, this was in -- the second</p> <p>19 sentence in Paragraph 16 refers to the</p> <p>20 '89 proceeding, a time at which there was a</p> <p>21 considerable contest between evidence submitted by</p> <p>22 other parties in the proceeding, the</p>
<p style="text-align: right;">Page 226</p> <p>1 transactions costs.</p> <p>2 And the objective seems to me should be</p> <p>3 to maintain a similar outcome, to reach the same</p> <p>4 outcome that would be obtained through these</p> <p>5 negotiations, which would, indeed, be reflective of</p> <p>6 the relative marketplace value of the</p> <p>7 programming.</p> <p>8 Q. And you mentioned that you have</p> <p>9 testified on relative marketplace value over</p> <p>10 the years of these proceedings.</p> <p>11 Have there been -- or are you aware of</p> <p>12 any -- anything since the last time you testified</p> <p>13 that changes your view with respect to the use of</p> <p>14 relative marketplace value?</p> <p>15 A. No, I'm not.</p> <p>16 Q. Then let me turn to the second topic on</p> <p>17 which I wish to question you.</p> <p>18 Are you familiar with the Bortz report</p> <p>19 and the Bortz surveys?</p> <p>20 A. Yes, I am.</p> <p>21 Q. And if you would turn in your written</p> <p>22 direct testimony to Paragraph 16, which appears on</p>	<p style="text-align: right;">Page 228</p> <p>1 Program Suppliers, involving viewing shares.</p> <p>2 And it was a significant contest</p> <p>3 between viewing shares and the Bortz study as to</p> <p>4 which ought to govern the allocation of copyright</p> <p>5 royalties.</p> <p>6 It was my view that the Bortz study was</p> <p>7 far superior to the viewing study.</p> <p>8 Q. Let's focus on today -- on this</p> <p>9 proceeding involving the 2004 and 2005 royalty</p> <p>10 funds.</p> <p>11 What is your view with respect to the</p> <p>12 Bortz survey as a tool for this proceeding?</p> <p>13 A. My view hasn't changed. It still seems</p> <p>14 to me to be the best source of information on</p> <p>15 relative marketplace values. And I've seen nothing</p> <p>16 that would replace it or -- or substitute for it.</p> <p>17 Q. And what is your understanding about --</p> <p>18 JUDGE WISNIEWSKI: Just a second,</p> <p>19 Mr. Cooper.</p> <p>20 What have you looked at?</p> <p>21 THE WITNESS: Well, I've looked at some</p> <p>22 of the testimony submitted -- the regression</p>

<p style="text-align: right;">Page 229</p> <p>1 analysis submitted by Professor Waldfogel of the 2 Wharton School, I believe. I've looked at 3 George Ford's testimony from the 4 Program Suppliers. 5 I guess those would be the two 6 principle alternatives I have looked at. 7 JUDGE WISNIEWSKI: Thank you. 8 BY MR. COOPER: 9 Q. Have you looked at alternatives that 10 have been offered in past proceedings? 11 A. Yes. 12 Q. Do you recall what other types of 13 evidence you've looked at? 14 A. They tend to fall into two categories, 15 regression analyses -- 16 CHIEF JUDGE SLEDGE: I'm sorry. Your 17 question is so vague, the answer won't be 18 meaningful. 19 Address your answer to the question in 20 this proceeding, not -- not the answer that would 21 be based on your view in prior proceedings. 22 THE WITNESS: In this proceeding, what</p>	<p style="text-align: right;">Page 231</p> <p>1 would carry and, if this were an unfettered market, 2 would be the ones making the purchase decisions 3 from the copyright owners or from the brokers or 4 agents representing the copyright owners. 5 MR. COOPER: No further questions, 6 Your Honor. 7 CHIEF JUDGE SLEDGE: 8 Cross-examination? 9 MR. LANE: Thank you, Your Honor. 10 For the record, Dennis Lane appearing 11 on behalf of Program Suppliers. 12 CROSS-EXAMINATION 13 BY MR. LANE: 14 Q. Dr. Crandall, could you turn to Page 5 15 of your testimony, please? 16 A. Yeah. I have it, yeah. 17 Q. And Paragraph 12, the last sentence is 18 the one to which I'm referring. 19 Do you have that in mind, sir? 20 A. Yes, I have it. 21 Q. Now, right at the end, you refer to 22 free market incentives that would otherwise exist</p>
<p style="text-align: right;">Page 230</p> <p>1 I've seen -- and I have -- don't think I've seen 2 everything that has been submitted -- there are 3 studies of the regression analysis formula that 4 I've mentioned, which is regressing copyright 5 royalty revenues on the amount of program minutes 6 in various categories. 7 And then there's also a study submitted 8 by Dr. Ford based upon viewing a -- particular 9 demographic categories of the various signals. 10 And I find neither one of those 11 persuasive compared to the Bortz survey. 12 BY MR. COOPER: 13 Q. What's your understanding of who the 14 respondents are in the Bortz survey? 15 A. The program director -- those people 16 that make programming decisions at the individual 17 cable systems. 18 Q. And do you have any view as to whether 19 that's the -- the right respondent for this survey? 20 A. Well, that -- that seems to me would 21 be -- is the -- the -- the group of people who are 22 making the decisions as to what the cable systems</p>	<p style="text-align: right;">Page 232</p> <p>1 for copyright owners to create content and permit 2 its use over the air? 3 A. Yes. 4 Q. And by "over the air," do you mean by 5 television broadcast situations? 6 A. Is it could be -- yes, presumably, 7 either -- yeah, over the air would mean broadcast 8 stations, right. 9 Q. So we can just reread that sentence to 10 substitute the over the air and just put broadcast 11 stations? It would be the same thing? 12 A. Well, it would not be exclusively that 13 way. I mean, obviously, we're talking here about 14 programs which are distributed over the air, but 15 then are also distributed to cable systems. 16 So in the context of this proceeding, 17 we're talking about imported distant signals, which 18 are initially broadcast over the air. 19 Q. Right. 20 But in this sentence, you're talking 21 about free market incentives that would otherwise 22 exist to copyright holders, correct?</p>

<p style="text-align: right;">Page 233</p> <p>1 A. Yes.</p> <p>2 Q. And those incentives in your sentence,</p> <p>3 do they refer to the broadcast station, incentives</p> <p>4 to create programs and permit use on broadcast</p> <p>5 stations?</p> <p>6 A. Initially, as I say, in this</p> <p>7 proceeding, it would be over the air, but this --</p> <p>8 as we know, this -- the content that is -- that is</p> <p>9 produced for perhaps initial broadcast over the</p> <p>10 air, maybe over -- first, through a network</p> <p>11 broadcast and then through, perhaps, syndication</p> <p>12 and then cable distribution or whatever, goes</p> <p>13 through a variety of different media.</p> <p>14 So I didn't intend that to mean for --</p> <p>15 for content that is distributed solely over the</p> <p>16 air. It's just in the context of this proceeding,</p> <p>17 it is initially distributed over the air.</p> <p>18 Q. Okay. So earlier in that sentence, you</p> <p>19 were referring to what Congress intended, were you</p> <p>20 not?</p> <p>21 A. In that paragraph?</p> <p>22 Q. Yes, in that paragraph in the third</p>	<p style="text-align: right;">Page 235</p> <p>1 But I'm talking about the incentives.</p> <p>2 And you also say, in the middle of that paragraph,</p> <p>3 that you're not aware that Congress -- and I'm</p> <p>4 going to skip a few words -- intended to change the</p> <p>5 relative distribution of any claimant's share; is</p> <p>6 that correct?</p> <p>7 A. Yes, that's correct, I'm not aware of</p> <p>8 any.</p> <p>9 Q. And -- and am I incorrect in inferring</p> <p>10 that you meant that Congress wasn't intending to</p> <p>11 change the incentives to create over-the-air</p> <p>12 programming?</p> <p>13 A. I don't have any evidence on that.</p> <p>14 Obviously, by setting a copyright fee, they changed</p> <p>15 the incentives. But what I'm saying is the</p> <p>16 relative distribution of the revenues that come</p> <p>17 from those copyright fees should not vary from what</p> <p>18 a market -- the relative distribution that a market</p> <p>19 would generate.</p> <p>20 Q. Now, could you turn the page?</p> <p>21 And Paragraph 13 carries over to</p> <p>22 Page 6.</p>
<p style="text-align: right;">Page 234</p> <p>1 line.</p> <p>2 A. Yes, yes, that paragraph, yes.</p> <p>3 Q. So this sentence is not intended to</p> <p>4 tell us what Congress intended; this sentence is</p> <p>5 intended to tell us your thoughts?</p> <p>6 A. Well, an economist's deduction and the</p> <p>7 reason for maintaining the distribution that a</p> <p>8 market would provide would be that it provides</p> <p>9 efficient signals as to which type of programming</p> <p>10 ought to be produced. So, yes, the final sentence</p> <p>11 is my deduction.</p> <p>12 Q. So that's your interpretation of what</p> <p>13 Congress intended; is that correct?</p> <p>14 A. It is my deduction as to the effect of</p> <p>15 what Congress intended, which was to replace a</p> <p>16 system of -- of a negotiation between cable</p> <p>17 system owners and copyright owners with a</p> <p>18 compulsory license, but to distribute the -- the</p> <p>19 revenues as a market would have distributed, or at</p> <p>20 least relatively as a market would have distributed</p> <p>21 them.</p> <p>22 Q. Right.</p>	<p style="text-align: right;">Page 236</p> <p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. And you refer, in the -- in the second</p> <p>4 line of that paragraph -- of that carryover</p> <p>5 paragraph, to the programming -- willing to buy</p> <p>6 rights to the programming directly or indirectly</p> <p>7 from the copyright holder.</p> <p>8 Do you see that?</p> <p>9 A. Yes, I do.</p> <p>10 Q. And what would be a direct transaction</p> <p>11 that you had in mind when you wrote this sentence?</p> <p>12 A. Well, here, I'm talking about the</p> <p>13 but-for, what would have taken place but-for the</p> <p>14 compulsory copyright.</p> <p>15 It is possible that cable system owners</p> <p>16 could've negotiated directly with a motion picture</p> <p>17 company, a professional sports organization,</p> <p>18 Ken Burns, anyone, to bring in programming for its</p> <p>19 cable system.</p> <p>20 However, as we know, in practice, for</p> <p>21 the most part, they deal with intermediates, with</p> <p>22 third parties, with brokers, with networks.</p>

<p style="text-align: right;">Page 237</p> <p>1 So it could be that they would</p> <p>2 negotiate with them indirectly through these</p> <p>3 networks, through the -- or through the distant</p> <p>4 broadcast station or deal with them directly. We</p> <p>5 don't know, but it is likely that -- it is more</p> <p>6 likely that it is the former than the latter.</p> <p>7 Q. Okay. You lost me.</p> <p>8 Which one was the former, direct or</p> <p>9 indirect?</p> <p>10 A. The former was the indirect.</p> <p>11 Q. The indirect?</p> <p>12 A. Yeah.</p> <p>13 Q. So do direct transactions between the</p> <p>14 cable system operator and owners, do they fall</p> <p>15 under Section 111?</p> <p>16 A. I'm not aware -- I'm not aware of --</p> <p>17 I'm not an expert on the law. And you have to tell</p> <p>18 me -- you have to read Section 111 to me.</p> <p>19 Q. So you don't know whether the direct</p> <p>20 transactions fall under the 111 purview?</p> <p>21 A. Well, I know what we're talking about</p> <p>22 here is the rebroadcasting of programming initially</p>	<p style="text-align: right;">Page 239</p> <p>1 A. Does what basic transaction change?</p> <p>2 Q. The transaction that -- to which you</p> <p>3 referred on that sentence between the holder and</p> <p>4 the station.</p> <p>5 A. If the cable system owner transmits</p> <p>6 through must carry in his own local station, in his</p> <p>7 own local market --</p> <p>8 Q. It's the station's local market, isn't</p> <p>9 it?</p> <p>10 A. Yeah, yeah.</p> <p>11 Q. Yeah.</p> <p>12 A. Does that carry -- frankly, I don't</p> <p>13 know whether there's any change to that</p> <p>14 transaction between the copyright holder and the</p> <p>15 station itself. I don't think so, but there could</p> <p>16 be.</p> <p>17 Q. Have you seen any evidence in the</p> <p>18 literature or any of the materials that you use</p> <p>19 in -- when you do research about television and</p> <p>20 cable that -- that there have been --</p> <p>21 A. I have not done any recent research on</p> <p>22 this particular issue, so I really haven't looked</p>
<p style="text-align: right;">Page 238</p> <p>1 assembled by a distant broadcaster and exported</p> <p>2 into the cable systems market.</p> <p>3 Q. Well, let me ask it this way: Is that</p> <p>4 an indirect transaction, what you just described,</p> <p>5 as you use it in your testimony here?</p> <p>6 A. Yes, indirectly with respect to the</p> <p>7 copyright owner.</p> <p>8 Q. If you could, would you turn to Page 3</p> <p>9 of your testimony, please, and look at Paragraph 8,</p> <p>10 please?</p> <p>11 A. Um-hum.</p> <p>12 Q. Do you have that in mind?</p> <p>13 A. Yes, I do.</p> <p>14 Q. Okay. So you talk about the</p> <p>15 broadcast -- I'm sorry -- the holder being</p> <p>16 compensated by the station -- I'm paraphrasing</p> <p>17 you -- at a rate negotiated between the holder and</p> <p>18 the seller; is that fair?</p> <p>19 A. Yes, yes.</p> <p>20 Q. Now, if a cable system retransmits the</p> <p>21 station's programming in the station's local</p> <p>22 market, does that basic transaction change?</p>	<p style="text-align: right;">Page 240</p> <p>1 at it.</p> <p>2 I've looked at contracts between</p> <p>3 copyright owners and networks over the years, but I</p> <p>4 have not looked at this one.</p> <p>5 Q. Do these negotiations between the</p> <p>6 holders and the stations, to your knowledge, occur</p> <p>7 regularly in the industry?</p> <p>8 A. I haven't checked lately, but I would</p> <p>9 assume so. They probably do it increasingly</p> <p>10 through brokers, but they used to do it through --</p> <p>11 well, there are large -- large brokers who provide</p> <p>12 syndicated programming to local stations, and</p> <p>13 there's direct negotiations for those; or between</p> <p>14 the owner of the station, which may be a multiple</p> <p>15 station owner, and the copyright holder.</p> <p>16 Q. And when you -- I'm sorry. Were you</p> <p>17 finished with your answer?</p> <p>18 A. Yes.</p> <p>19 Q. And when you were speaking of the</p> <p>20 station here, were you including brokers and</p> <p>21 intermediaries and the multiple station owners?</p> <p>22 A. Oh, sure, it could be. It could be</p>

<p style="text-align: right;">Page 241</p> <p>1 through an intermediary.</p> <p>2 Q. So the station is -- we'll just use</p> <p>3 station as -- is that fair to just use station as a</p> <p>4 shorthand for all those people?</p> <p>5 A. For all which people?</p> <p>6 Q. The brokers and the multiple station</p> <p>7 owners.</p> <p>8 A. The brokers are -- are intermediaries,</p> <p>9 often, or they may be people who -- who are dealers</p> <p>10 who really own the programming and sell large</p> <p>11 numbers of programming to the stations.</p> <p>12 Q. And these -- these transactions to</p> <p>13 which you refer here are between willing buyers and</p> <p>14 willing sellers?</p> <p>15 A. Yes, I presume so.</p> <p>16 Q. And would it be fair to say that the</p> <p>17 resulting license fee are marketplace prices for</p> <p>18 the programming --</p> <p>19 A. Yes.</p> <p>20 Q. -- in these transactions?</p> <p>21 A. Yes.</p> <p>22 Q. Now, in this same paragraph on Page 3,</p>	<p style="text-align: right;">Page 243</p> <p>1 extent.</p> <p>2 Q. I'm just talking about the local market</p> <p>3 at this point. The cable system is -- it's a</p> <p>4 must-carry situation, and the cable system is</p> <p>5 retransmitting in the local -- the station's local</p> <p>6 market in my example.</p> <p>7 A. I see.</p> <p>8 We're talking only about the carriage</p> <p>9 of a local signal by a cable system?</p> <p>10 Q. Yes.</p> <p>11 A. Yes.</p> <p>12 Q. Exactly.</p> <p>13 A. And your question then is?</p> <p>14 Q. Does the fact that the station relies</p> <p>15 on advertising revenues generated from -- revenues</p> <p>16 generated from advertising inserted into the</p> <p>17 program change because of that cable</p> <p>18 retransmission?</p> <p>19 A. I presume it does, because it provides</p> <p>20 some different coverage and better coverage.</p> <p>21 That's perhaps why broadcast stations lobby heavily</p> <p>22 for must carry.</p>
<p style="text-align: right;">Page 242</p> <p>1 Paragraph 8, that is, you say that the broadcast</p> <p>2 station -- again, I'm going to just try to shorten</p> <p>3 it -- generates revenues through advertising</p> <p>4 inserted in the program.</p> <p>5 Is that a fair summary?</p> <p>6 A. In the typical commercial broadcasting</p> <p>7 arena, yes, that's -- that's right.</p> <p>8 Q. And that's what you say on this</p> <p>9 page --</p> <p>10 A. Right.</p> <p>11 Q. -- right?</p> <p>12 A. Right.</p> <p>13 Q. Now, do you know, does that value</p> <p>14 change that -- I'm sorry. Let me get your words --</p> <p>15 I don't want to put words -- did the revenue's</p> <p>16 generation coming from advertising for the station</p> <p>17 change because the station signal is retransmitted</p> <p>18 in its local market by a cable system?</p> <p>19 A. I haven't looked into that, but it</p> <p>20 would depend on whether they're selling any</p> <p>21 advertising into the national spot market.</p> <p>22 But I presume that it does to some</p>	<p style="text-align: right;">Page 244</p> <p>1 Q. Right.</p> <p>2 And do -- would that be a situation</p> <p>3 that would occur, for example, for U.S. -- for --</p> <p>4 in the old days before -- when we had UHF</p> <p>5 channels?</p> <p>6 A. Yeah.</p> <p>7 Q. Would that be a way that would increase</p> <p>8 the UF -- UH --</p> <p>9 A. Yes.</p> <p>10 Q. And could you just explain for the</p> <p>11 Judges what UHF stations are as compared to VHF</p> <p>12 stations?</p> <p>13 A. In the early days of broadcasting, the</p> <p>14 Federal Communications Commission allocated</p> <p>15 different parts of the spectrum: lower frequencies</p> <p>16 to Channels 2 through 13 and higher frequencies</p> <p>17 called UHF stations to Channels 14 and above.</p> <p>18 Because of tuner design and because of</p> <p>19 propagation characteristics, the higher channels</p> <p>20 often were more difficult to receive, did not carry</p> <p>21 as well in the local market, and, therefore, signal</p> <p>22 carriage by cable systems of these stations greatly</p>

<p style="text-align: right;">Page 245</p> <p>1 improved their competitiveness relative to VHF 2 stations. 3 Is that correct? 4 Q. You're the one giving the answers. I'm 5 just asking questions. 6 So in that situation, would it be fair 7 to say that the UHF station might enjoy greater 8 advertising revenues because it's reaching a larger 9 audience? 10 A. Yes. 11 Q. Is it fair to say that -- and I think 12 this is an economist's term that I often derive, 13 but all other things constant, a larger audience 14 would produce greater advertising revenues for a 15 television station based on the advertising 16 inserted in a program? 17 A. That may not be true. It depends on 18 elasticity of demand. 19 It is possible, indeed, that if you're 20 an inelastic portion of the demand curve for 21 advertising minutes, greater audience may not, 22 but . . .</p>	<p style="text-align: right;">Page 247</p> <p>1 discourse with you on advertising, but -- 2 Q. This is your sentence on Page 3? 3 A. Yeah. 4 Q. It talks about broadcasting 5 generating -- broadcaster generating revenues from 6 advertising inserted in a program. 7 A. Right. 8 Q. I'm asking you about that testimony. 9 A. Well, I just simply make mention of it. 10 I haven't thought deeply about the nature of the 11 demand for advertising in local television markets 12 today. 13 Q. Now, if you would, would you please 14 turn to Page 4 of your testimony and Paragraph 9? 15 And, again, I always seem to hit these as the 16 carryover paragraph from Page 3. 17 And I'm looking at the first line in 18 particular, right? 19 A. I'm sorry. Paragraph? 20 Q. Well, it's really 9. It starts on 3, 21 but it's the first line on Page 4 at the top of the 22 page.</p>
<p style="text-align: right;">Page 246</p> <p>1 Q. And what would be some of the factors 2 that you would consider in deciding whether a 3 particular spot was in an inelastic portion of the 4 day? 5 A. One would have to have some measure, 6 presumably, of the -- of what the demand function 7 looks like for that advertising market. 8 I think it's unlikely, frankly, 9 Mr. Lane, but I think it's possible -- 10 Q. Okay. 11 A. -- that it's inelastic. 12 Q. Do you have any idea in mind besides 13 inelasticity of some of the factors that would be 14 considered in what amount of advertising revenues a 15 station could expect from a particular program in a 16 day part? 17 A. Well, keep in mind that my testimony is 18 about the value of imported distant signals to 19 cable system owners where they can't advertise. So 20 I haven't spent much time thinking of advertising 21 as I prepared for this. 22 I mean, I would be happy to carry on a</p>	<p style="text-align: right;">Page 248</p> <p>1 Do you see that? 2 A. Yes. 3 Q. Okay. And, here, you say that the 4 terms of the compulsory license are set by 5 statute? 6 A. Yes. 7 Q. Do you have that in mind? 8 A. Yes. 9 Q. So that means that the incentives that 10 are paid in the broadcast market could not apply 11 because the statute has intervened. 12 Is that what you're trying to say 13 there? 14 A. I'm simply describing how this -- how 15 this takes place. At this point, I don't believe 16 I'm saying anything about incentives in that 17 sentence. 18 Q. Okay. And the -- would it be fair to 19 say that where license fees are set by statute, 20 that's not a free market? 21 A. Certainly. 22 Q. Do you know if devotional programmers</p>

<p style="text-align: right;">Page 249</p> <p>1 pay stations to get air time to broadcast their 2 programs? 3 A. I haven't looked into that. No, I do 4 not know at this point. 5 Q. Do you know whether Dr. Sallinger, 6 whose testimony you've cited, discussed that 7 issue? 8 A. I don't recall. I don't recall if 9 he -- I was citing his approval in the Bortz study. 10 I don't recall what he said about other matters in 11 that testimony. 12 MR. LANE: Those are all the questions 13 I have. 14 CHIEF JUDGE SLEDGE: Further cross? 15 Did you plan with Mr. Lane to give you 16 a segue into your testimony? 17 MR. LUTZKER: We worked very hard on 18 it. 19 CROSS-EXAMINATION 20 BY MR. LUTZKER: 21 Q. Dr. Crandall, my name is Arnie Lutzker, 22 and I represent the Devotional Claimants.</p>	<p style="text-align: right;">Page 251</p> <p>1 CHIEF JUDGE SLEDGE: Mr. Lutzker? 2 MR. LUTZKER: The witness was asked and 3 answered the question that -- in effect, stating 4 that he found neither Dr. Waldfogel's nor the 5 viewing study persuasive in relation to his -- his 6 presentation. 7 And in his testimony, I would add that 8 on Footnote 10 on Page 6, he references prior 9 regression studies. And to the extent he indicated 10 that neither were persuasive, I just wanted to 11 understand what he meant by neither were persuasive 12 in this proceeding. 13 MR. COOPER: Your Honor, may I note we 14 have the same objection that Mr. Lane has with 15 respect to the scope of the direct? 16 MR. LANE: See, Your Honor, I'm friends 17 with everybody. 18 MR. LUTZKER: Don't push it. And I 19 represent Devotional Claimants. 20 CHIEF JUDGE SLEDGE: Mr. Cooper, would 21 you explain yours in a little more detail? 22 (Laughter.)</p>
<p style="text-align: right;">Page 250</p> <p>1 A. Pardon my ignorance about your client. 2 Q. That's perfectly okay. 3 I actually wanted to follow up on your 4 comments earlier, questioning from the Panel, where 5 you said, in this proceeding, you were familiar 6 with Dr. Waldfogel's regression analysis, the Bortz 7 study and a viewing study as soon as Dr. Ford's 8 viewing blended -- 9 A. Viewing/advertising study. 10 Q. You said neither are persuasive -- 11 MR. LANE: Your Honor, I'd like to 12 object to this line. 13 I thought when the Judges ask the 14 question, they can expand. This is clearly 15 rebuttal testimony. This is testimony that has 16 just been exchanged. It's our direct case; it's 17 Mr. Stewart's case, Dr. Waldfogel. 18 So I don't know how we can go 19 into having this witness on direct talk about it. 20 He can come back in rebuttal and discuss this, but 21 it just seems to me not a line of questioning that 22 should be allowed at this time.</p>	<p style="text-align: right;">Page 252</p> <p>1 MR. COOPER: I agree with Mr. Lane that 2 questions from the Panel, which the witness should 3 respond to and did respond to -- 4 CHIEF JUDGE SLEDGE: What panel are you 5 referring to? 6 MR. COOPER: I'm referring to 7 Judge Wisniewski's question. 8 CHIEF JUDGE SLEDGE: I'm not aware of 9 any panel. 10 MR. COOPER: I'm sorry, Your Honor. I 11 apologize. 12 Questions from the Judges, or from the 13 Judge in this particular case, he was responding to 14 should not be the subject of -- of cross when 15 they're outside the written direct, and they 16 weren't part of my direct questioning. 17 CHIEF JUDGE SLEDGE: Mr. Lutzker, do 18 you have any -- 19 MR. LUTZKER: In the direct -- let me 20 find the paragraph reference. 21 On Paragraph 15, the witness says, The 22 parties in the Phase I proceedings have generally</p>

<p style="text-align: right;">Page 253</p> <p>1 advocated using one of two competing methodologies, 2 which are -- which include the value of 3 retransmitted programming, constant sum surveys and 4 household viewing studies. And he's reflecting on 5 methodologies that are at issue in this proceeding. 6 CHIEF JUDGE SLEDGE: The objection is 7 overruled. 8 THE WITNESS: I'm not sure there's a 9 question yet. 10 Why don't you rephrase the question 11 then? 12 BY MR. LUTZKER: 13 Q. My question is -- 14 CHIEF JUDGE SLEDGE: I'll be in charge 15 of the questions. You answer the questions. 16 THE WITNESS: I'm sorry. I'm sorry. I 17 don't recall his question. I'm sorry. 18 BY MR. LUTZKER: 19 Q. I'm happy to repeat the question. 20 The question is, you indicated that 21 neither a regression analysis approach of 22 Dr. Waldfogel or a viewing category approach were</p>	<p style="text-align: right;">Page 255</p> <p>1 weighted minutes of programming does not get to the 2 critical issue if, in fact, some minutes are a lot 3 more valuable than others, even within categories 4 of sports. 5 I would have paid a lot more last night 6 to watch Brett Favre play that game than a lot of 7 other NFL games that are going to be on this year. 8 You can't just simply count minutes and then 9 regress it on copyright royalties and suggest that 10 gets you to the right answer. 11 MR. LUTZKER: That's my only question. 12 Thank you. 13 CHIEF JUDGE SLEDGE: You may not want 14 to leave the podium, Mr. Lutzker. 15 I don't understand how you can say that 16 you are not addressing the merits of the Ford 17 testimony or the regression analysis when you say 18 that that testimony you have reviewed is not 19 persuasive. 20 THE WITNESS: I just explained why it 21 is not persuasive. I do not -- I have not reviewed 22 it carefully enough --</p>
<p style="text-align: right;">Page 254</p> <p>1 persuasive and that you advocate the 2 Bortz survey -- constant sum survey as the 3 methodology for allocating and determining the 4 relative market value of the principal programming 5 categories; is that correct? 6 A. Yes. 7 And may I explain what I meant by it? 8 I was not going to the merits of the 9 Waldfogel testimony nor the merits of the Ford 10 testimony, per se, which, as Mr. Lane indicated, 11 have not even been introduced yet, apparently, but, 12 rather, to point out that looking at viewing and 13 the advertising market is not going to get you very 14 far in deciding how much cable system operators 15 will pay for retransmitted programming on 16 broadcast -- distant broadcast stations in which 17 they cannot insert advertising. 18 Secondly, it is not that regression 19 analysis, per se -- I've done a lot of it myself -- 20 is not informative; it's that a regression of 21 copyright royalties on the number of minutes of 22 programming or, in some past years, on viewer</p>	<p style="text-align: right;">Page 256</p> <p>1 CHIEF JUDGE SLEDGE: I understand that 2 you've said it's not persuasive. 3 Then how can you now say that you're 4 not addressing the merits of the testimony -- of 5 that testimony? 6 THE WITNESS: I am addressing the 7 relevance of that approach to the problem that you 8 face, and I'm suggesting that that approach, 9 regardless of how well it's executed, does not get 10 to the heart of the matter, which is the value of 11 this programming to cable system operators. 12 MR. LUTZKER: You're correct. If I can 13 do one follow-up question? 14 CHIEF JUDGE SLEDGE: I thought you 15 might. 16 BY MR. LUTZKER: 17 Q. If, in a regression analysis -- if I 18 say that a regression coefficient has a confidence 19 level of 95 percent, what does that mean? 20 A. It means that -- that given the -- the 21 error of estimating it, that in 95 percent -- that 22 95 percent of the time, it is significantly greater</p>

<p style="text-align: right;">Page 257</p> <p>1 than zero. And there's a 5 percent probability 2 that it is not significantly different from zero. 3 Q. And what does a 90 percent confidence 4 level mean? 5 A. By the same token, it's just a less 6 tight confidence interval. It suggests that it's a 7 10 percent chance that it's a statistically 8 insignificant variable, i.e., its coefficient might 9 not be significantly different from zero. 10 Q. And what if there is no confidence 11 level provided? 12 A. Then the person who did the analysis 13 has left out something that is very important. 14 MR. LUTZKER: Okay. That -- now I'm 15 done, unless you want me to -- 16 CHIEF JUDGE SLEDGE: Any redirect? 17 MR. COOPER: No, Your Honor. 18 CHIEF JUDGE SLEDGE: Further cross? 19 Mr. Lane? 20 MR. LANE: No, Your Honor. 21 CHIEF JUDGE SLEDGE: Questions from the 22 Bench?</p>	<p style="text-align: right;">Page 259</p> <p>1 THE WITNESS: Yes. 2 But as you know, cable systems are -- 3 are owned by large organizations. There's some 4 very large organizations. There's Comcast, 5 Cablevision who own many of these systems. 6 However, it's my understanding that 7 despite the fact that these multiple system owners 8 have hundreds or even thousands of these systems, 9 that they often delegate the programming choices to 10 people with local knowledge of the audience in 11 their communities so that -- it's probably useful 12 to think typically of an individual cable system 13 programming manager, although it may be -- a fellow 14 may have or the woman may have authority over 15 several systems in an immediate geographic area. 16 Here, in Washington, for instance, it 17 could be Montgomery County, the District and 18 Fairfax County combined. But it's my understanding 19 that a lot of these programming decisions are not 20 made from the central office in Denver or 21 Philadelphia. 22 JUDGE WISNIEWSKI: So when you talk</p>
<p style="text-align: right;">Page 258</p> <p>1 JUDGE WISNIEWSKI: Sure. 2 Dr. Crandall, you talked throughout 3 your testimony about the assumed hypothetical 4 market that -- that you'd like us to be looking at 5 here; is that correct? 6 THE WITNESS: I don't know that I talk 7 about what a hypothetical market should look like, 8 but I have views on it, yes. 9 JUDGE WISNIEWSKI: In terms of the 10 market that you think we should be looking at here, 11 you talk about who the buyers are, and you refer to 12 them alternatively in different ways, but, 13 generally speaking, as on Page 5, as cable systems. 14 THE WITNESS: Yes. 15 CHIEF JUDGE SLEDGE: Could you define 16 cable systems for me? Are we talking about -- I'm 17 trying to get at whether we're talking about local 18 cable systems, whether we're talking about groups 19 of cable systems under the same franchise label or 20 what are we talking about? 21 THE WITNESS: Well, as, you know -- 22 CHIEF JUDGE SLEDGE: In your testimony.</p>	<p style="text-align: right;">Page 260</p> <p>1 about the market here, you're talking about the 2 buyers being the local cable operators? 3 THE WITNESS: Yes, the -- probably 4 typically the local cable operators or some amalgam 5 of local cable operators, not the entire national 6 Comcast system. 7 JUDGE WISNIEWSKI: And what is it that 8 they're buying? 9 THE WITNESS: Well, in this particular 10 instance, what we're talking about, of course, is 11 the imported distant signal. 12 Perhaps you could take the -- 13 JUDGE WISNIEWSKI: In the economic 14 sense, what are they buying in the abstract? 15 THE WITNESS: They are buying the 16 rights to distribute copyrighted programming of all 17 kinds of -- of programming which happens to be on 18 one distant broadcast signal. 19 JUDGE WISNIEWSKI: Aren't they buying 20 an input? 21 THE WITNESS: They're buying a very 22 important input to their service, which is the</p>

<p style="text-align: right;">Page 261</p> <p>1 programming.</p> <p>2 JUDGE WISNIEWSKI: So we're talking</p> <p>3 about an input market?</p> <p>4 THE WITNESS: Right.</p> <p>5 JUDGE WISNIEWSKI: Typically, in an</p> <p>6 input market, how do we get at demand?</p> <p>7 THE WITNESS: It's derived from the</p> <p>8 final customer demand.</p> <p>9 JUDGE WISNIEWSKI: In terms of the</p> <p>10 level of competition in this market that you talk</p> <p>11 about, what level of competition do we have?</p> <p>12 THE WITNESS: It depends on the</p> <p>13 geographic market.</p> <p>14 JUDGE WISNIEWSKI: Well, but you're</p> <p>15 talking about a market here from -- which is</p> <p>16 supposed to substitute for the -- for the fee as</p> <p>17 derived from the Bortz survey.</p> <p>18 THE WITNESS: But you asked me what</p> <p>19 kind of competition do we have.</p> <p>20 I mean, typically, in most markets,</p> <p>21 what you have is one cable system operator and one</p> <p>22 satellite -- or two satellite companies -- I'm</p>	<p style="text-align: right;">Page 263</p> <p>1 THE WITNESS: -- no off the air?</p> <p>2 I suppose they compete with off-the-air</p> <p>3 broadcasting as well. The off-the-air broadcaster</p> <p>4 won't be buying the imported distant signal, but he</p> <p>5 certainly competes with the cable system.</p> <p>6 JUDGE WISNIEWSKI: Humor me. Suppose</p> <p>7 we just have the one.</p> <p>8 THE WITNESS: It's a hypothetical.</p> <p>9 It's a hypothetical.</p> <p>10 JUDGE WISNIEWSKI: Yes.</p> <p>11 THE WITNESS: Yes.</p> <p>12 JUDGE WISNIEWSKI: How much competition</p> <p>13 do we have on the buyer side?</p> <p>14 THE WITNESS: By your hypothetical,</p> <p>15 none. We just have one -- one supplier of video</p> <p>16 services in that market.</p> <p>17 JUDGE WISNIEWSKI: Do you know how</p> <p>18 often that situation prevails in the United States?</p> <p>19 THE WITNESS: By your hypothetical, no</p> <p>20 broadcast signals, no satellite, only in the -- it</p> <p>21 would only be occasionally in a remote part of the</p> <p>22 country on the north side of a mountain as far as I</p>
<p style="text-align: right;">Page 262</p> <p>1 sorry.</p> <p>2 But now, increasingly, you're getting</p> <p>3 telephone companies offering video services as</p> <p>4 well. So it can vary across markets.</p> <p>5 Where Verizon has wired out FIOS or</p> <p>6 AT&T has wired out its U-verse service, there's</p> <p>7 more competition. So it's not constant across</p> <p>8 geographic markets.</p> <p>9 JUDGE WISNIEWSKI: To the extent that</p> <p>10 there is a single local cable operator, do we have</p> <p>11 any competition on the buyer's side?</p> <p>12 THE WITNESS: Yes.</p> <p>13 The -- he has to compete -- I mean,</p> <p>14 he -- he competes with the satellite provider. The</p> <p>15 satellite provider --</p> <p>16 JUDGE WISNIEWSKI: I said to the extent</p> <p>17 that we had one cable operator in the market.</p> <p>18 THE WITNESS: Oh, I'm sorry. No</p> <p>19 other --</p> <p>20 JUDGE WISNIEWSKI: Nothing else.</p> <p>21 THE WITNESS: -- no satellite --</p> <p>22 JUDGE WISNIEWSKI: Yes.</p>	<p style="text-align: right;">Page 264</p> <p>1 can tell. It would be very, very rare.</p> <p>2 JUDGE WISNIEWSKI: Okay.</p> <p>3 So we really have to admit something</p> <p>4 other than cable TV into our consideration here</p> <p>5 or definition of market in order to get at a value</p> <p>6 at a price for this input.</p> <p>7 Is that fair to say?</p> <p>8 THE WITNESS: If we were trying to</p> <p>9 price the input, yes. If we were trying to find</p> <p>10 out what is the level of the price that the cable</p> <p>11 operator would pay, yes.</p> <p>12 But the debate here is over how to</p> <p>13 allocate the copyright royalties, not what the</p> <p>14 price of an individual program would be.</p> <p>15 JUDGE WISNIEWSKI: Wouldn't that affect</p> <p>16 the valuation?</p> <p>17 THE WITNESS: Certainly, the -- the</p> <p>18 distribution of the cable systems' demand for</p> <p>19 diverse kinds of programs would affect the price in</p> <p>20 the hypothetical market. There's no doubt about</p> <p>21 it.</p> <p>22 JUDGE WISNIEWSKI: Thank you.</p>

<p style="text-align: right;">Page 265</p> <p>1 CHIEF JUDGE SLEDGE: Any follow-up 2 questions from those? 3 MR. COOPER: No, Your Honor. 4 CHIEF JUDGE SLEDGE: Thank you, sir. 5 THE WITNESS: Thank you. 6 CHIEF JUDGE SLEDGE: Call your next 7 witness. 8 MR. MARSH: Stephen Marsh for Joint 9 Sports Claimants. 10 Our next witness is Judy Meyka. 11 CHIEF JUDGE SLEDGE: Please come up to 12 the chair. 13 WHEREUPON, 14 JUDITH MEYKA 15 was called as a witness and, having been first 16 duly sworn, was examined and testified 17 as follows: 18 CHIEF JUDGE SLEDGE: Thank you. 19 Please be seated. 20 DIRECT EXAMINATION 21 BY MR. MARSH: 22 Q. Ms. Meyka, could you please state your</p>	<p style="text-align: right;">Page 267</p> <p>1 And then the same is true working with 2 cable operators and the satellite companies, really 3 just giving them my view based on my experiences as 4 a cable operator. 5 Q. Now, with respect to your experience as 6 a cable operator, what, specifically before you 7 were a consultant, were you doing with the cable 8 industry? 9 A. Well, right before I started my 10 consulting work, I worked for a cable operator by 11 the name of Adelphia Communications. We had about 12 5 million subscribers in 31 states across the 13 country. 14 Q. And what was your position with 15 Adelphia? 16 A. I was the senior vice president of 17 programming. 18 Q. What responsibilities did that entail? 19 A. The programming group with the cable 20 operator is really the group that is responsible 21 for acquiring all of the content that we then 22 distribute to our subscribers.</p>
<p style="text-align: right;">Page 266</p> <p>1 full name for the record? 2 A. Judith Meyka. 3 Q. And what is your current occupation? 4 A. Currently, I work as an independent 5 consultant working with clients in the cable and 6 satellite television industry. 7 Q. Now, what type of clients, 8 specifically, are you working with in the cable and 9 satellite industry? 10 A. For the most part, I work with cable 11 programming networks, and I also work with 12 distribution companies, such as cable operators and 13 satellite operators. 14 Q. When you're doing consulting work with 15 those organizations, what type of projects are you 16 working on? 17 A. It varies, obviously, but, for the most 18 part, my consulting has to do with -- particularly 19 with respect to cable networks, giving them kind of 20 a cable operator view of things, such as 21 distribution and other issues that come up in -- in 22 the distribution world.</p>	<p style="text-align: right;">Page 268</p> <p>1 So it was really my group that was 2 responsible for negotiating all of the -- the 3 contracts for content -- content, including cable 4 networks and broadcast stations. Really, we 5 oversaw all of the channel lineups that we had 6 through the country in all of our systems, making 7 sure that we had final approval on changes that 8 would be made to those lineups, strategy for 9 programming decisions going forward -- you know, 10 whole range of things. 11 Q. Did that include any responsibility 12 with respect to distant signals? 13 A. Yes. 14 I mean, it had responsibility for all 15 content, which distant signals are obviously 16 content. So we absolutely would have oversight on 17 that. 18 With respect to, though, broadcast 19 signals and, particularly, distant signals, we 20 worked very closely with our field personnel on 21 making any kind of decisions that had to be made 22 with respect to the broadcast level of service.</p>

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Robert Crandall Direct Oral Testimony (JSC Written Direct Statement Vol. III) to the following:

Canadian Claimants Group, represented by Victor J Cosentino served via Electronic Service at victor.cosentino@larsongaston.com

MPAA-represented Program Suppliers, represented by Alesha M Dominique served via Electronic Service at amd@msk.com

National Association of Broadcasters (NAB), represented by David J Ervin served via Electronic Service at dervin@crowell.com

Public Broadcasting Service (PBS), represented by Dustin Cho served via Electronic Service at dcho@cov.com

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

Broadcast Music, Inc. (BMI), represented by Brian A Coleman served via Electronic Service at Brian.Coleman@dbr.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

SESAC, Inc., represented by John C. Beiter served via Electronic Service at jbeiter@lsglegal.com

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

National Public Radio, Inc. (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Signed: /s/ Michael E Kientzle